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CITATIONS

731070—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 911

VERNA LOYD GARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

No. 916

WILLIAM ANTON WELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Each petitioner is a Jehovah's Witness. They were separately indicted in the United States District Court for the Western District of Texas for refusing to report for induction, in violation of Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311) (No. 911, R. 1-2; No. 916, R. 1-2). At their separate

trials before the court, a jury having been waived in each case (No. 911, R. 3; No. 916, R. 3), it was undisputed that they were finally classified I–A (No. 911, R. 19; No. 916, R. 24); that they were thereafter ordered to report for induction, the order in each case advising the registrant that he would be physically examined at the induction station and might be rejected (No. 911, R. 9–10; No. 916, R. 7–8); that petitioners received the orders (No. 911, R. 11; No. 916, R. 27); and that they did not report for induction (No. 911, R. 10, 20. No. 916, R. 9).[1]

In No. 911, petitioner Garland rested at the close of the Government's case without offering any defense (R. 21). He was found guilty and sentenced to imprisonment for three years (R. 21–22, 25–27). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 41–43).

In No. 916, the trial court permitted petitioner Wells fully to develop his defense that the selective service boards had exceeded their jurisdiction in denying him exemption as a minister of

[1] In each case the petitioner underwent a preinduction physical examination prior to the issuance of the order to report for induction. Petitioner Garland had such an examination on May 19, 1944, and he was ordered to report for induction on June 11, 1945 (No. 911, R. 8, 15). Petitioner Wells had his preinduction physical examination on October 12, 1945, and he was ordered to report for induction on December 17, 1945 (No. 916, R. 7–8, 10).

religion and that there were irregularities in the boards' proceedings. At the conclusion of the trial, the court stated in an oral opinion (R. 66):

> The Court holds under this testimony in this case that it is insufficient to show any arbitrary action upon the part of the Board in failing to classify him as a minister; and the classification was made by the Board and confirmed by the Appeal Board on review. The Court will further state, in the opinion of this Court, and the Court here so holds and announces the evidence does not show that he is a minister within the contemplation and meaning of the Selective Training and Service Act. * * *

Accordingly, petitioner was convicted and sentenced to imprisonment for three years (R. 68–70). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 84–94). Although the Fifth Circuit recognized the applicability of the *Falbo* decision, 320 U. S. 549, the court stated that it preferred to rest its decision upon a determination of the validity of the induction order within the limits of judicial review announced in *Estep* v. *United States*, 327 U. S. 114 (R. 85, 87). The court then discussed each of petitioner's challenges to the jurisdiction of the selective service boards and found them to be without merit (R. 88–94).

In this Court, both petitioners urge that their selective service boards exceeded their jurisdiction. This contention, however, is unavailable to petitioners for, by refusing to report for induction, they failed to exhaust their administrative remedies. If petitioner Garland had reported as he was ordered to do, he would have been required to undergo a "complete examination," since his preinduction examination had occurred more than 90 days previously. Petitioner Wells, on the other hand, would have undergone a "physical inspection" to ascertain whether there had been a change in his physical condition in the period intervening between the preinduction examination and the date he was to report, and thus to determine whether at that time he was acceptable to the Army. His position is the same as that of the petitioner in *Cahoon* v. *United States,* No. 183, this Term, certiorari denied, October 14, 1946, rehearing denied January 20, 1947. See also *Hudson* v. *United States,* No. 887, this Term, certiorari denied, February 3, 1947, and our petition for a writ of certiorari in the *Balogh* case, No. 800, this Term, pp. 13–18.

On the authority of this Court's decision in *Falbo* v. *United States,* 320 U. S. 549, and *United States* v. *Balogh, supra,* decided January 20, 1947, we respectfully submit that the only contention which petitioners urge is not open to

them, and that the petitions for writs of certiorari should therefore be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

FEBRUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947